

1-2007

## Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Refusals

Lauren Treadwell

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

Lauren Treadwell, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Refusals*, 58 HASTINGS L.J. 869 (2007).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol58/iss4/5](https://repository.uchastings.edu/hastings_law_journal/vol58/iss4/5)

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

## Notes

# Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals

LAUREN TREADWELL\*

### INTRODUCTION

Sarah is a young woman who lives in a suburb of Memphis, Tennessee, with her mother, stepfather, and three younger half-sisters. After breaking up with her recent long-term boyfriend, whom she dated for more than a year, she discovers that she is pregnant. Sarah is seven months shy of her eighteenth birthday upon learning the news.<sup>1</sup>

Sarah has received a soccer scholarship to college next fall and worries that having a baby will ruin her ability to fulfill the scholarship, pursue her education, and fundamentally reduce her prospects for the future. She would like to talk to her mother about the situation, but she knows that her stepfather will find out if she does. Sarah's relationship with her stepfather is tumultuous. Her stepfather does not treat Sarah like he treats his own daughters and has expressed pointed concern to her mother that Sarah is a bad influence on his three daughters. Sarah strongly believes it will turn out very badly for her if he were to find out that she is pregnant. She fears that her stepfather will kick her out of the house and possibly become physically abusive.<sup>2</sup> Her stepfather has been physically menacing to Sarah in the past, and occasionally violent—

---

\* J.D. Candidate, University of California, Hastings College of the Law, 2007. I would like to thank Professors Ashutosh Bhagwat, Geoffrey Hazard, John Malone, and Evan Lee for their thoughtful insights and willingness to help. In addition, I am tremendously grateful for the love, support, and encouragement of J.T. Treadwell and Sharron and Bob O'Pezio.

1. Sarah is a fictional character and her situation is hypothetical.

2. Fear of abuse is a common reason many pregnant minors give for not involving their parents in the abortion decision. *See infra* Part III.

destroying furniture and other household items during arguments. Sarah decides against telling her mother and tries not to think about the situation—perhaps with a teenager's hope that her problem will simply go away.

A few months go by and Sarah begins to show. She starts wearing loose and baggy clothing to hide her increasing waistline and realizes she has to do something. Because she still does not want to have a baby, Sarah decides to get an abortion. She finally works up the nerve to go to Planned Parenthood, and during her consultation she finds out that Tennessee has a parental consent law,<sup>3</sup> which means that she cannot get an abortion without first getting the consent of her parents. Telling her mother is still not a viable option, so Sarah decides to apply for judicial waiver of the parental consent law and permission to make the abortion decision herself.<sup>4</sup> She is intimidated about going to court and telling a judge her story, but it seems like a better option than exposing herself to her stepfather's certain rage. With the help of a representative from Planned Parenthood, Sarah files all the necessary paperwork with the court, hoping that it will all be over soon.

Unfortunately, the system breaks down for Sarah. None of the circuit court judges in Memphis will hear her case; they all recuse themselves from the case on moral grounds, citing their strong religious beliefs that abortion is murder. Because Sarah did not start the process immediately upon learning of her pregnancy, by the time she learns she does not have immediate access to a judicial hearing she is already into her second trimester. If she cannot get a judge to hear her case soon, it may be too late—her pregnancy will advance beyond the point where she can legally get an abortion. Therefore, it is imperative that a judge hear her case or legally she will be forced to carry the pregnancy to term.

The above hypothetical situation is an increasingly likely possibility for large numbers of young women in many parts of the United States. In states as varied as Tennessee, Minnesota, Pennsylvania, and Alabama, judges are recusing themselves on moral grounds from cases where minors petition the court for the right to make their own decisions about abortion.<sup>5</sup> In conservative areas, these incidences of recusal are becoming more publicly known as stances of conscience, and they may increase the

---

3. Although this is a hypothetical situation, Tennessee does, in fact, have a parental consent law. TENN. CODE ANN. § 37-10-303 (2005 & Supp. 2006).

4. A judicial waiver (also called a judicial bypass) is the process through which a minor may petition the court for a waiver of the state's law requiring parental consent or notification before a minor can obtain an abortion. See *infra* Part I. The terms "judicial waiver" and "judicial bypass" are used interchangeably throughout this Note.

5. See Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, § 1 (Nat'l Rep.), at 21; see also *Hodgson v. Minnesota*, 497 U.S. 417, 440 (1990) (noting that in Minnesota "a number of counties are served by judges who are unwilling to hear bypass petitions").

likelihood that additional judges (especially those elected or appointed in conservative districts) will feel free to choose this option more readily. In Memphis, Tennessee, for example, the majority of Shelby County Circuit Court judges are refusing to hear minors' abortion petitions, resulting in a dramatically increased workload for the remaining judges who are willing to hear the petitions.<sup>6</sup>

This Note surveys the potential problems that may arise if judges across the country continue to recuse themselves from minors' abortion petitions on moral grounds. Part I provides a brief overview of the history of abortion laws in the United States, specifically focusing on parental consent statutes and the judicial bypass procedure. Part II describes the current standards governing judicial recusal. Part III examines the undue burden standard as defined by *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Part IV studies the issues resulting from judicial recusals from bypass petitions. In particular, Part IV focuses on whether the recusals create an undue burden on the minor's right to choose, the responsibility of the states to provide minors with an effective judicial bypass procedure, and potential solutions to the problem. This Note concludes that if judicial recusals from minors' bypass petitions become widespread, more steps will need to be taken to protect minors' reproductive rights.

## I. OVERVIEW OF JUDICIAL BYPASS LAWS

The United States Supreme Court's landmark ruling in *Roe v. Wade* established that states cannot prohibit abortion prior to the viability of the fetus.<sup>7</sup> This rule applies to all abortions, regardless if the pregnant woman is a minor or an adult.<sup>8</sup> However, subsequent rulings have allowed states to have some authority to restrict minors' rights in a variety of contexts—including minors' rights to get an abortion.<sup>9</sup> In *Bellotti v. Baird (Bellotti II)*, the Supreme Court advanced three policy reasons behind state restrictions on minors' rights: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in

---

6. Liptak, *supra* note 5.

7. 410 U.S. 113, 164-66 (1973).

8. See *Hodgson*, 497 U.S. at 435 ("[T]he constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women."); see also *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 642 (1979) ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority." (citing *Roe*, 410 U.S. at 153)); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." (citations omitted)).

9. *Bellotti II*, 443 U.S. at 635-36 & n.13.

child rearing.”<sup>10</sup> The Supreme Court then attempted to strike a compromise between the state interests in protecting children and the fundamental rights of minors.<sup>11</sup> This compromise permits states to require that a pregnant minor obtain parental consent before getting an abortion, but only if the minor is given the opportunity to seek a waiver of that consent through judicial bypass.<sup>12</sup> The judicial bypass procedure allows a minor to petition the court for a waiver of the parental consent law, thereby allowing her the right to make her own decision about abortion without having to consult her parents.<sup>13</sup> Thus, the Court acknowledged that while states have a significant interest in encouraging parental involvement when a minor seeks an abortion, states cannot allow parental involvement to inhibit minors’ constitutionally-protected right to abortion.<sup>14</sup>

In *Bellotti II*, the Supreme Court examined a Massachusetts parental consent statute that included a judicial bypass procedure, but only allowed a minor to exercise that option after first consulting her parents about her abortion decision.<sup>15</sup> If the minor’s parents refused to give consent, only then could the minor petition the court for a waiver of the parental consent law.<sup>16</sup> The Supreme Court struck down the statute and stated “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents.”<sup>17</sup> In addition, the Supreme Court established guidelines concerning when a minor’s request for a waiver of a parental consent law must be granted.<sup>18</sup> The Court said that a pregnant minor seeking a judicial waiver may

show either (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the “absolute, and possibly arbitrary, veto” that was found impermissible in *Danforth*.<sup>19</sup>

---

10. *Id.* at 634.

11. *See id.* at 649.

12. *See id.*

13. *Id.* at 647. Alternatively, *Bellotti II* provides that if the judge believes the minor is not mature enough to make the decision herself, the judge may decide for the minor that an abortion is in her best interest, thereby allowing her to get an abortion without consulting her parents. *Id.* at 647–48.

14. *Id.* at 648.

15. *Id.* at 625.

16. *Id.*

17. *Id.* at 647.

18. *Id.* at 643–44.

19. *Id.* (footnote omitted).

Thus, *Bellotti II* has served as an outline for states to follow when constructing statutes mandating parental involvement in a minor's abortion decision.<sup>20</sup>

Many states have legislation restricting young women's access to abortion by requiring parental notification or consent if the woman is under the age of eighteen,<sup>21</sup> and most states have modeled their statutory language after the language the Supreme Court used in its rulings on parental involvement.<sup>22</sup> To date, twenty-three states require one or both parents to consent for a minor to get an abortion,<sup>23</sup> thirteen states require notification of one or both parents,<sup>24</sup> and another nine states have passed some sort of parental involvement statute that remains unenforced.<sup>25</sup>

Regulations that mandate parental consent before a minor can get an abortion are valid only if there is an alternative procedure in place whereby the minor may petition the court for the right to get an abortion without consulting her parents.<sup>26</sup> However, it is unclear whether the same is true of parental notification statutes.<sup>27</sup> The Supreme Court has ruled that any statute that amounts to a "parental veto" over the minor's abortion decision is unconstitutional if not accompanied by an option for judicial bypass of the law.<sup>28</sup> In addition, *Planned Parenthood of Southeastern Pennsylvania v. Casey* mandates that restrictions cannot

---

20. See Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 75 (2001).

21. GUTTMACHER INST., STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS, (Jan. 1, 2007), [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf) ("While most states laws apply to minors under 18, South Carolina's law applies to women under 17 and Delaware's law applies to women under 16.").

22. Silverstein, *supra* note 20, at 72.

23. See GUTTMACHER INST., *supra* note 21 (Alabama, Arizona, Arkansas, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming).

24. *Id.* (Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nebraska, Oklahoma, South Dakota, Utah, and West Virginia).

25. *Id.* (Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico).

26. *Bellotti II*, 443 U.S. 622, 647 (1979).

27. See Helena Silverstein & Leanne Speitel, "Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75, 81 (2002) (noting that although the Supreme Court has yet to decide whether parental notification statutes must be accompanied by a judicial bypass option, "virtually all state laws that mandate parental notice of abortion include a bypass provision modeled along the lines of *Bellotti II*"). Most recently, in *Ohio v. Akron Center for Reproductive Health*, the Supreme Court upheld a parental notification statute that included a judicial bypass option. 497 U.S. 502, 506-07 (1990). The Court noted that notice statutes are different from parental consent statutes because they do not give anyone veto power over the minor's abortion decision, thus intimating that bypass procedures are not necessary for parental notification statutes. *See id.* at 510-11.

28. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

impose an "undue burden" on the minor's right to choose.<sup>29</sup> As defined in *Casey*, "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>30</sup> Without an effective bypass mechanism, parental consent or notification statutes indirectly allow parental vetoes of a minor's abortion decision, thereby creating an undue burden on the minor's right to choose. Thus, the presence of an effective judicial bypass mechanism is fundamental to the validity of parental consent or notification statutes.

## II. STANDARDS GOVERNING JUDICIAL RECUSAL

It is generally believed that a "judge . . . [must] put aside, to the extent humanly possible, values that are personal to him or her, including values that are drawn from the set of religious beliefs which that judge holds," in order to decide cases fairly and impartially.<sup>31</sup> However, it is not realistic to expect that in all cases a judge will be able to successfully set aside his or her personal values. In such cases the judge's ability to decide the case objectively and impartially, as well as the public's faith in the judge's likelihood to decide the case objectively and impartially, will be significantly impaired.

The federal law governing recusal contains two separate standards.<sup>32</sup> The first standard, 28 U.S.C. § 455(a), provides for disqualification of a judge in any proceeding in which his or her impartiality may be questioned.<sup>33</sup> The exact language of this section states, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>34</sup> Section 455(a) has been interpreted as the objective standard that deals with the outward appearances of the judiciary.<sup>35</sup> It calls for the disqualification of any judge when his or her impartiality may reasonably be in question, regardless of whether the judge feels as though he or she can be objective and fair.<sup>36</sup>

---

29. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

30. *Id.* at 877.

31. Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351, 351-52 (1998).

32. For the purposes of this discussion, this Note will only focus on federal recusal standards. Each state has their own standards for judicial recusal; however, the state standards are often modeled after the federal language or are similar enough in purpose and effect to make a discussion of only the federal standards generally applicable. See Sherrilyn A. Iffil, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 99 n.19 (1997).

33. 28 U.S.C. § 455(a) (2000).

34. *Id.*

35. Saphire, *supra* note 31, at 354; see also *Liteky v. United States*, 510 U.S. 540, 548 (1994) ("[W]hat matters is not the reality of bias or prejudice but its appearance.").

36. See 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3549 (2d ed. 1984).

Section 455(a) was amended in 1974 to read as it does now.<sup>37</sup> This amendment ended the duty-to-sit concept and marked a drastic change in judicial recusal standards in federal courts.<sup>38</sup> Prior to the 1974 amendment, the rule in federal courts was that judges had a duty to sit in all cases except where grounds for disqualification met statutory standards.<sup>39</sup> Now, section 455(a) takes the position of a reasonable person informed of all the facts and does not require an actual showing that the judge would be impartial.<sup>40</sup> Under section 455(a), if a reasonable person knowing all the circumstances would question the judge's impartiality, then there is a basis for disqualification.<sup>41</sup>

The second standard for judicial recusal, section 455(b)(1), states that a judge shall also disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>42</sup> As opposed to section 455(a), section 455(b)(1) has been interpreted to require an actual showing of bias, not simply the appearance of bias.<sup>43</sup> However, there is a significant amount of scholarly debate about what actually defines "personal bias or prejudice."<sup>44</sup> At a minimum, it includes feelings of personal animosity on the part of the judge towards one of the parties; however, many scholars argue that it encompasses even more.<sup>45</sup> After reviewing Supreme Court precedent on death qualified juries, Dean (then Professor) John Garvey and Professor Amy Coney suggested that "personal bias or prejudice" requires recusal when judges are faced with a case in which their moral conscience would alter the way they determine the facts or cause them to violate their oath to follow and apply the law.<sup>46</sup>

While Dean Garvey and Professor Coney's article was limited to judges in capital murder cases, presumably the same conclusion holds true for judges facing an abortion case. If the judge's moral beliefs about abortion are so embedded in his conscience that he cannot bring himself to neutrally apply the law, he should recuse himself from the case. The critical assumption, however, is that there are other judges available who are willing to hear the case. This assumption appears to be consistently

---

37. *Id.*

38. *Id.*

39. *Id.*

40. See Saphire, *supra* note 31, at 354.

41. WRIGHT, MILLER & COOPER, *supra* note 37.

42. 28 U.S.C. § 455(b)(1) (2000).

43. Saphire, *supra* note 31, at 354.

44. See *id.*

45. *Id.*

46. See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 333-34 (1998).



valid in capital punishment cases,<sup>47</sup> but is more suspect in abortion proceedings. A problem arises when many or all of the judges recuse themselves, resulting in a collective abdication of duty. One can make an analogy to the problem of the "last lawyer in town" who refuses to assist a client with a claim or defense that, although legally well grounded, is repugnant to the lawyer's religious or moral beliefs.<sup>48</sup> Legal scholars have long defended the ethics of criminal defense by pointing to this "last lawyer" situation and by arguing that all lawyers partake of the ethical right, and the shared duty, to serve.<sup>49</sup> Similarly, judges would have an ethical duty to hear abortion cases when there is no other judge available since recusal by the "last judge" effectively would deprive the minor of her legal entitlement. Thus, judges should not have a completely unqualified right to recuse themselves; rather each judge has an ethical duty, shared with others, to allocate the task of serving even in unpopular cases. Unfortunately, however, the mere presence of a shared ethical duty may not be enough to ensure judges will actually be willing to serve.

Many believe that in a secular state judges are obligated to enforce the law, and if a judge cannot, or will not, enforce the law, he or she should be forced to resign. For example, Senator Charles E. Schumer wrote a letter to the editor of *The New York Times* arguing it was a "dereliction of duty" for federal judges to recuse themselves from cases that require them to impose mandatory minimum prison sentences for violations of federal drug laws.<sup>50</sup> Although many likely share Senator Schumer's point of view,<sup>51</sup> it is not consistent with federal law. No provision of federal law requires a judge to resign simply because the judge's moral beliefs might interfere with the case. To the contrary, federal law only requires recusal. In an often-quoted passage on judicial disqualification, the late Chief Justice Rehnquist said, "[p]roof that a Justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."<sup>52</sup>

---

47. There is no scholarly research, newspaper or periodical citation, or other information suggesting there is a problem finding replacements for judges who recused themselves from capital punishment cases.

48. Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 562.

49. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-77 (1966); W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 KAN. L. REV. 977, 983-85 (2000); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 613.

50. Charles E. Schumer, Letter to the Editor, *The Judges Transgress*, N.Y. TIMES, May 3, 1993, at A14.

51. For examples of similar opinions, see generally Avern Cohn, Letter to the Editor, *A Questionable Exclusion*, 78 JUDICATURE 5 (1994) and A.M. Rosenthal, *Dismantling the War*, N.Y. TIMES, May 18, 1993, at A21.

52. *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

Based on the current state of the law on judicial recusal, state court judges who recuse themselves from cases where minors petition the court for a waiver of the parental consent laws do not violate their ethical obligations as a member of the judiciary. Rather, judges, who because of strongly held religious or moral beliefs about abortion cannot impartially apply the law, appropriately recuse themselves from such cases. However, despite the appropriateness of this behavior, constitutional problems inevitably result.

While a judge bases his or her individual recusal decision on his or her distinct moral beliefs, and such private conduct does not have to comply with the Constitution,<sup>53</sup> the states in which the judges work are under a constitutional obligation to provide minors with an effective judicial bypass procedure.<sup>54</sup> States must ensure effective bypass procedures regardless of the various political or moral leanings of their judges. Thus, a constitutional challenge develops when so many state court judges recuse themselves that the judicial bypass mechanism ceases to be effective. In such cases, the judges' actions, when viewed collectively, may create a substantial obstacle to a safe and timely abortion and thereby rise to the level of state action imposing an undue burden on minors' rights to choose abortion. Judges act in their official capacities when they refuse to hear bypass petitions and their collective abdication of duty can be chargeable to the state.<sup>55</sup> If the judicial bypass procedure is no longer considered "sufficiently expeditious" or effective because of rampant recusals, the state has implicitly allowed an undue burden on minors' fundamental right to abortion.

### III. THE UNDUE BURDEN STANDARD

As discussed briefly in Part I, *Planned Parenthood of Southeastern Pennsylvania v. Casey* established the undue burden standard as the current standard used to examine the constitutionality of state abortion regulations.<sup>56</sup> The authors of the joint opinion in *Casey* stated the following about the undue burden standard: "Regulations which . . . [only] create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the

---

53. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.1, at 547 (3d ed. 2006).

54. *Bellotti II*, 443 U.S. 622, 647 (1979).

55. The Supreme Court has ruled that the "action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

56. 505 U.S. 833, 877 (1992). While *Casey* was a joint opinion with only three Justices (O'Connor, Kennedy, and Souter) supporting the undue burden standard, *id.* at 843, 878, the subsequent case of *Stenberg v. Carhart*, 530 U.S. 914 (2000), established the undue burden standard as the standing precedent on abortion with five Justices voting in agreement.

woman's exercise of the right to choose."<sup>57</sup> Thus, under the undue burden standard, states may express a clear preference for childbirth rather than abortion and may impose any regulation in furtherance of that preference so long as the regulation does not amount to a substantial obstacle.<sup>58</sup> The authors of the joint opinion further stated:

To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.<sup>59</sup>

Judicial recusals are likely not the type of "regulation" the Court had in mind when deciding *Casey*, but nonetheless recusals have the same effect as laws regulating access to abortion, and consequently, the recusals trigger application of the undue burden standard. Here, like the regulations discussed in *Casey*, the recusals are focused on abortion. That is, the recusals occur specifically in abortion cases and may even be attempts by the judges to make it more difficult for minors to obtain an abortion at all.<sup>60</sup> The net effect of widespread recusals could be similar to a situation where the state passed a regulation severely restricting minors' access to the courts by requiring all bypass petitions to be funneled through only one or two judges in the whole state; however, instead of the state passing a law regulating access, the judges have regulated access through aggregated individual decisions in their capacity as state actors. Therefore, if the recusals are widespread they are, in effect, additional regulations of abortion triggering the undue burden standard.

It is also important to note that the joint opinion in *Casey* made clear that when determining whether there is undue burden on the right to choose "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."<sup>61</sup> As a result, the argument that judicial recusals do not create an undue burden on the majority of pregnant minors because they involve their parents in the abortion decision voluntarily is irrelevant to the issue under discussion.<sup>62</sup> Rather, the proper focus of the

---

57. *Casey*, 505 U.S. at 877.

58. *Id.* at 878.

59. *Id.*

60. Although it may be impossible to determine the exact motivation behind each recusal, Judge John R. McCarroll of Shelby County Circuit Court in Memphis, Tennessee has stated that he believes abortion to be taking the life of an innocent human being and against the moral order. Liptak, *supra* note 5. It is therefore logical to assume that Judge McCarroll, and others who share his views, are recusing themselves from abortion petitions in the hope that it will make it more difficult for minors to obtain an abortion and may dissuade the minors from getting an abortion at all.

61. *Casey*, 505 U.S. at 894.

62. In fact, nearly half of teens voluntarily involve their parents in the abortion decision. Based

constitutional inquiry is on the group of young women that relies on the judicial bypass procedure as the sole mechanism for exercising its fundamental right to choose. According to a study published in *Family Planning Perspectives*, an estimated 22% of pregnant minors did not consult a parent about their abortion decision because they feared being kicked out of the house, and 8% were credibly concerned they would be physically abused because their parents had beaten them before.<sup>63</sup> Young women who need the judicial bypass procedure may be a minority of the population affected by parental involvement laws, but their reasons for needing the procedure are credible and serious. For these young women, the recusals may operate as a substantial obstacle to their right to choose an abortion, and the inquiry must focus on whether there is an undue burden on this subset of the population.

#### IV. PROBLEMS CREATED BY BYPASS PETITION RECUSALS

Judicial recusals from cases where a minor petitions the court for a waiver of the state's parental consent law raise numerous questions. Specifically, the recusals raise questions regarding: (a) whether the recusals impose an undue burden on the pregnant minor's right to choose; (b) the responsibility of the states to remedy the situations if an undue burden has been established; (c) potential solutions to the problem; and finally, (d) the possibility of a procedural due process violation if the pregnant minor cannot find a judge willing to hear her petition.

##### A. DO THE RECUSALS IMPOSE AN UNDUE BURDEN?

In *Casey*, the Supreme Court stated explicitly that "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right."<sup>64</sup> The Court further explained "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."<sup>65</sup> Thus, the Court held that a state-mandated twenty-four hour waiting period before obtaining an abortion does not amount to a substantial obstacle even though it may impose added costs, both in terms of time and money, on the woman.<sup>66</sup>

As an analogy to the twenty-four hour waiting period in *Casey*, the

---

on a national survey of more than 1500 unmarried minors having abortions in states without parental involvement laws, 45% of young women discussed the decision to have an abortion with at least one of their parents. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 200 tbl.3 (1992).

63. *Id.* at 200.

64. 505 U.S. at 873.

65. *Id.* at 874.

66. *Id.* at 886-87.

judicial recusals at issue here likely do not impose a substantial obstacle on the minor's right to choose if only a small minority of judges per jurisdiction refuse to hear bypass petitions. If there are still a substantial number of judges in the jurisdiction willing to hear the petitions, the inconvenience and burden on the minor's right will be minimal. If only one or two judges recuse themselves, the minor's petition could be quickly and easily reassigned to another judge. In such a scenario, it is likely the process would be quick enough that the minor's petition would be heard and resolved with sufficient expedition to meet the standard laid out in *Bellotti II* and the minor may never even be aware of the recusal.

In jurisdictions where the number of judges recusing themselves from bypass petitions threatens the expeditious processing of such cases, an acceptable alternative would be to reassign the minor's petition to a willing judge in a neighboring county, as often happens in Minnesota.<sup>67</sup> The District Court responsible for the initial findings of fact in *Hodgson v. Minnesota* found that bypass petitions filed in non-metropolitan parts of Minnesota, which are often served by judges unwilling to hear the petitions, are reassigned to judges in the metropolitan parts of the state who are more willing to hear such petitions.<sup>68</sup> The minor must then travel to reach the willing judge in order to receive an expeditious hearing of her petition.<sup>69</sup> The District Court concluded that although the reassignments were burdensome, they did "not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner."<sup>70</sup>

While in most high population density jurisdictions one of the above acceptable situations is usually present, for an increasing number of jurisdictions, particularly in socially conservative regions of the country, the situation is rapidly becoming more tenuous. Due to a number of factors, there is a high likelihood that in some jurisdictions the adequate judicial resources necessary for the expedient resolution of bypass petitions may disappear. First, the last two decades have seen a resurgence of social conservatism at all levels of government. This conservative ascendancy has placed more judges with socially conservative views in more jurisdictions, raising the overall number and percentage of judges likely to recuse themselves.<sup>71</sup> Second, in the current

---

67. *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986).

68. *Id.*

69. *Id.*

70. *Id.*

71. See generally Robert A. Carp et al., *The Voting Behavior of George W. Bush's Judges: How Sharp a Turn to the Right?*, in *PRINCIPLES AND PRACTICE OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS* 429, 438-41 (Samuel Kernell & Steven S. Smith eds., 3d ed. 2007) (discussing a study of thousands of federal court cases revealing that judges appointed by President

political climate where states such as South Dakota have openly challenged *Roe v. Wade*,<sup>72</sup> it seems unlikely that more states will adopt process-facilitating solutions similar to Minnesota's; rather, the opposite may be the trend.<sup>73</sup> Finally, and perhaps most importantly, judicial recusal has become more visible<sup>74</sup> and more political, increasing the likelihood that socially conservative judges will consider recusal, that abortion opponents will pressure judges for future recusals, and that political appointments of judges may consider future recusals as part of the qualification for appointment. In short, a storm is brewing that is likely to produce an unfortunate situation like that described in the Introduction to this Note—where not enough judges in the jurisdiction will hear petitions and parental veto rights will be indirectly granted.

Thus, in order to correctly analyze the impact of the recusals on the minors' right, it is not appropriate to assume that only a few judges are refusing to hear bypass petitions. Rather, a more current and relevant question is whether it is constitutionally permissible for a substantial proportion of judges in a jurisdiction to recuse themselves from cases where minors are petitioning the court for a waiver of the state's parental consent law. Put in the language of the joint opinion from *Casey* the question is, do the recusals have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus?"<sup>75</sup>

*1. Yes, Recusals Could Create a Substantial Obstacle on the Minor's Right to Choose*

The state interests central to *Casey* are inapposite to judicial recusal. Even though *Casey* dramatically increased the ability of the states to declare a preference for childbirth over abortion, the state's ability is not unlimited.<sup>76</sup> The authors of the joint opinion specifically stated "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>77</sup> Therefore, the states' ability to place restrictions on a woman's right to choose is limited to matters that "inform the woman's free choice." Thus, in addition to regulations designed to protect the health and safety of the mother,<sup>78</sup> the state is allowed to take steps to ensure the woman's choice

---

George W. Bush are the most conservative on record in the areas of civil rights and liberties). Although this study focuses on federal judges it is indicative of a political constituency driving this broader trend in state judiciaries as well.

72. Ronald Bailey, *Some Questions About South Dakota's Anti-Abortion Law*, S.F. CHRON., Mar. 12, 2006, at E3.

73. See Liptak, *supra* note 5.

74. *Id.*

75. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

76. *See id.*

77. *Id.*

78. Regulations designed to protect the health and safety of the mother are constitutional under

is "thoughtful and informed."<sup>79</sup> This may include ensuring the woman is informed both of the many alternatives to abortion as well as the many social and psychological arguments against abortion.<sup>80</sup> In addition, the state may force the woman to listen to information about fetal development<sup>81</sup> and impose a short waiting period between receiving the information and obtaining the abortion.<sup>82</sup> All of these regulations are designed to ensure that the woman's choice is given close thought and attention. The goal is to ensure the woman is aware of the potential long-term negative mental and physical consequences that may result if she proceeds with the abortion.

In contrast to regulations and procedures designed to inform the woman's choice that are supported under *Casey*,<sup>83</sup> the judicial recusals at issue here do not provide any information, or periods of consideration, to the minor's choice. Instead, the recusals, if they happen with enough frequency to rise to the level of state action, impose a significant impediment to the pregnant minor's right to expeditious processing of the judicial bypass procedure, and consequently, her right to choose whether or not to have an abortion. The collective effect of the recusals does not ensure that a young woman's choice is thoughtful and informed, since no information about abortion, its effects on the woman, or the moral and psychological impacts thereof, is conveyed to the minor. In short, unlike the sanctioned procedures and steps from *Casey* mentioned earlier, where the delay imposed on the exercise of a woman's right to get an abortion is offset by the value gained in the state's interest in serving a policy goal,<sup>84</sup> there is no policy goal being served in the disruption collective judicial recusals causes. Therefore, states' increased ability to regulate abortion laid out in *Casey* is inapplicable to judicial recusals.

In terms of their implications for the participants, collective judicial recusals are more similar to the spousal notification requirement the Court struck down in *Casey* than the regulations designed to inform the woman's choice approved in *Casey*.<sup>85</sup> The authors of the joint opinion stated that the spousal notification requirement would serve as a substantial obstacle to the many women who are victims of domestic violence at the hands of their husbands.<sup>86</sup> Whether through actual

---

Roe v. Wade, 410 U.S. 113, 164 (1973).

79. *Casey*, 505 U.S. at 872.

80. *Id.* at 882.

81. *Id.*

82. *Id.* at 887.

83. *Id.* at 882, 887.

84. *Id.*

85. *Cf. id.* at 897, 898.

86. *Id.* at 897.

physical violence or severe emotional intimidation, the Court reasoned that the spousal notification provision may provide the woman's spouse with the ability to veto her abortion decision.<sup>87</sup> Since many of the minors who exercise the judicial bypass option do so because they fear retribution or even violence from their parents,<sup>88</sup> collective recusals may create a situation where the parents may obtain effective veto power over the minor's abortion decision if the minor cannot receive a sufficiently expeditious hearing. Thus, collective judicial recusals play a similar role to that of the spousal notification provision found unconstitutional in *Casey*, and any type of veto power over a woman's right to an abortion has consistently been held unconstitutional by the Supreme Court—first in *Danforth* and later in *Bellotti II*.<sup>89</sup> The Court explicitly established the judicial bypass procedure to prevent a parental veto over a minor's abortion decision.<sup>90</sup> Yet if a sufficient number of judges in one jurisdiction recuse themselves from hearing bypass petitions such that an expeditious hearing cannot be had, the opportunity has been created for such vetoes to arise.

Collective judicial recusals serve as a hindrance to the bypass process, preventing the minor from having an expeditious hearing. In situations where a critical mass of judges willing to hear bypass petitions remains, this is an inconsequential hindrance. In situations where the critical mass is on the side of recusal, it is a hindrance of significant materiality that can create an implicit parental veto. Some might even argue that a recusal in itself is a deliberate action by the judge to make the abortion more difficult to attain. By refusing to hear the case, the judge has limited the most efficient path of resolution of the issue for the minor—a fact some judges have acknowledged.<sup>91</sup> Here it is important to note that although the judge's actions may be guided by conscience, their actions do nothing to serve any legitimate state interest. The result of each recusal is a small obstacle in the path of the woman's right to choose, with multiple recusals building into a substantial obstacle. By imposing a substantial obstacle without any offsetting legitimate state interest, widespread collective recusals may qualify as an undue burden on minors' rights to choose if not remedied, and do not qualify for the exemptions associated with advancing a substantial state interest outlined in *Casey*.

---

87. *Id.*

88. Henshaw & Kost, *supra* note 62, at 202 tbl.5.

89. See *Bellotti II*, 443 U.S. 622, 647–48 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976).

90. *Bellotti II*, 443 U.S. at 647.

91. See Liptak, *supra* note 5.



## B. OBLIGATION OF THE STATE TO PROVIDE AN EFFECTIVE BYPASS PROCEDURE

As discussed above, Supreme Court precedent in *Casey*, *Bellotti II*, and *Danforth* requires the inclusion of a judicial bypass procedure in parental consent statutes for the statutes to be constitutional.<sup>92</sup> As a result, all of the parental consent or notification statutes currently in place have a judicial bypass option.<sup>93</sup> Thus, the presence of the judicial bypass option in state statutes creates an obligation on state judiciaries to develop and implement processes to handle bypass petitions. However, in jurisdictions across the country, there is initial evidence suggesting occasional breakdowns of the system through failures to adequately handle bypass petitions because of judicial recusals.<sup>94</sup>

The exact number of judges who are choosing to recuse themselves may be impossible to calculate, as many judges do not speak publicly about their decision. However, as this problem is becoming more widespread, and is receiving more and more national attention, it is possible to get a sense for the depth of the problem. In Memphis, Tennessee, for example, the majority of the judges in Shelby County Circuit Court refuse to hear bypass petitions.<sup>95</sup> One judge even went on the record stating “[t]aking the life of an innocent human being is contrary to the moral order. I could not in good conscience make a finding that would allow the minor to proceed with the abortion.”<sup>96</sup> Additional research focused on Alabama uncovered that out of the sixty-seven counties in the state,<sup>97</sup> twenty-five were ill-prepared to handle bypass petitions,<sup>98</sup> and another six counties were completely unwilling to hear the petitions because of the local judges’ views about abortion.<sup>99</sup> Finally, a similar study of Pennsylvania concluded that the same lack of preparedness applied to nearly two-thirds of counties in the state.<sup>100</sup>

Given the above, it is not a stretch to conclude that, while the problem is not universal, the failure of the states to meet their obligation to provide an effective and expedient judicial bypass procedure is becoming significant enough across the country to create a constitutional issue. As discussed in Part II, there is no specific provision of law that

---

92. See *supra* Part I.

93. GUTTMACHER INST., *supra* note 21. In Utah, judicial bypass is available if a minor fails to obtain parental consent, but there is no bypass option for the state’s parental notification requirement. UTAH CODE ANN. § 76-7-304.5(4) (Supp. 2006).

94. Liptak, *supra* note 5.

95. *Id.*

96. *Id.*

97. Silverstein & Speitel, *supra* note 27, at 85.

98. *Id.* at 95.

99. *Id.* at 102.

100. Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 88 (1999).

requires individual judges to hear a case when they feel they cannot neutrally and impartially apply the law. Rather, in such situations, the law simply requires the judges to recuse themselves.<sup>101</sup> However, despite the legal propriety of the recusals, a state still has a constitutional obligation to provide pregnant minors with an effective bypass procedure if the state has a parental consent law. If the recusals undermine the effectiveness of the bypass procedure, a state has a responsibility to either correct the situation or provide for an effective alternative.<sup>102</sup> If states do not, they are failing their constitutional obligations, and therefore may not enforce the parental consent and notification statutes.

### C. ALTERNATIVE SOLUTIONS AND THE RULE OF NECESSITY

The current solution to the problem of judicial recusals implemented by many state judiciaries is simply to reassign the petition to another judge in the same jurisdiction.<sup>103</sup> As long as a substantial proportion of judges are willing to hear such petitions, this likely remains the best solution. It allows for a seamless transfer of the case with hopefully no increased burden on the minor. If there are no judges willing to hear bypass petitions in the jurisdiction where the minor has filed her petition, an acceptable alternative is to transfer the petition to a neighboring county. States such as Minnesota and Alabama have enacted such a solution.<sup>104</sup> However, neither of these solutions will solve the problem if all, or a substantial proportion, of the judges in a state, or region of a state, refuse to hear bypass petitions. In such a scenario, it is the responsibility of the state to make sure the courts are staffed with enough judges willing to hear bypass petitions. However, a difficulty arises because it is virtually impossible for states to ensure that the religious and moral convictions of the candidates for the state judiciary will not prevent them from impartially applying the state's abortion law.<sup>105</sup>

Therefore, if the current availability of judges to hear bypass petitions is insufficient to provide for expeditious processing of those petitions, then it is the responsibility of the state to force the current judges to hear the petitions under the Rule of Necessity. The Rule of Necessity is a common law principle dating back to 1430 that requires a judge to take part in the decision of a case if the case cannot be heard

---

101. See *supra* Part II.

102. For a few suggested solutions, see *infra* Part IV.C.

103. See *Hodgson v. Minnesota*, 497 U.S. 417, 440 (1990).

104. See *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986); Silverstein & Speitel, *supra* note 27, at 103.

105. See U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

otherwise.<sup>106</sup> According to the Supreme Court in *United States v. Will*, “[t]he Rule of Necessity has been consistently applied . . . in both state and federal courts.”<sup>107</sup> In *Will*, the Court dealt with a challenge to Congress’s attempts to block statutory cost-of-living wage increases for federal judges.<sup>108</sup> Upon review, the Supreme Court noted that normally, under 28 U.S.C. § 455, all federal judges ought to recuse themselves from the case because they all had a personal interest in the outcome—namely, the amount of their salaries.<sup>109</sup> Consequently, the regular administrative procedure of reassigning the case to another judge without a personal interest was not possible.<sup>110</sup> Thus, the Supreme Court held that under the Rule of Necessity, the federal judges would be allowed to hear the case because otherwise there would be no forum for resolution.<sup>111</sup> Interestingly, in *Will*, the Supreme Court raised the issue of the Rule of Necessity sua sponte, as both the petitioners and respondents agreed that 28 U.S.C. § 455 did not require the federal judges to recuse themselves.<sup>112</sup> The Supreme Court felt the sensitive nature of the issue required “the same degree of care and attention” as if either the petitioners or respondents had raised the issue themselves.<sup>113</sup>

In the Court’s discussion of the use of the Rule of Necessity in both federal and state courts, it quoted the Supreme Court of Pennsylvania, which held:

The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be.<sup>114</sup>

In addition, the Supreme Court reviewed the House and Senate Reports on section 455, which reflected “a constant assumption that upon disqualification of a particular judge, another would be assigned to the case.”<sup>115</sup> Thus, the Court concluded that Congress in no way intended section 455 to alter the ancient Rule of Necessity.<sup>116</sup> Rather, the Court reasoned that the purpose of section 455 was to provide litigants with a fair and neutral forum, and failure to apply the Rule of Necessity in situations where it is needed would have the contrary effect of

---

106. *United States v. Will*, 449 U.S. 200, 213–14 (1980).

107. *Id.* at 214.

108. *Id.* at 202.

109. *Id.* at 212.

110. *Id.*

111. *Id.* at 217.

112. *Id.* at 212.

113. *Id.*

114. *Id.* at 214 (quoting *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870)).

115. *Id.* at 216.

116. *Id.*

completely denying the litigants their right to a forum at all.<sup>117</sup>

Through comparison to the Supreme Court's analysis of the Rule of Necessity in *Will*, it becomes clear that state judges may be forced to hear bypass petitions, regardless of any moral or religious objections, if that is the only option available to provide a forum for the minor. Perhaps the state judiciaries could develop a rotating or lottery system in which individual judges would only have to hear bypass petitions occasionally, rather than forcing a few specific judges to hear all of the petitions. If judges still refuse to hear the petitions under the Rule of Necessity, the states should consider disciplinary action against the judges.<sup>118</sup> If enough judges refuse to hear the petitions so as to make the judicial bypass mechanism ineffective, and a state is unwilling to enforce the Rule of Necessity or the disciplinary actions that may be required to make it effective, then that state cannot constitutionally enforce the parental consent law.<sup>119</sup>

Application of the Rule of Necessity is likely the least attractive solution to the problem of judicial recusals from bypass petitions. Forcing judges who are opposed to abortion to hear these cases is rife with potential to produce very negative consequences. For example, in order to protect the confidentiality of the minor, all bypass petitions are closed proceedings,<sup>120</sup> and it will be very hard to monitor or police the actions of rogue judges. If a judge inappropriately interjects his or her religious or moral beliefs about abortion into the proceeding, there will be virtually no timely way to correct the situation.

As noted by the Supreme Court in *Hodgson*, "[t]he court experience produce[s] fear, tension, anxiety, and shame among minors."<sup>121</sup> If a minor is berated during the hearing by a judge who does not agree with her abortion decision, the minor may be too humiliated to appeal an unfavorable decision. With closed proceedings, there is a reduced likelihood that a judge would be reprimanded for unethical behavior. Although, the likelihood of belligerent judges is low, it is more likely that a disinclined judge may listen quietly to a well-qualified case and reject the petition on moral grounds unrelated to the minor's case. The minor may appeal, but would have to do so successfully along an incredibly accelerated timeline in order to reverse the decision in time to affect her pending choice. More likely such a decision made with prejudice will

---

117. *Id.* at 217.

118. See Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1238 (2000) (arguing that one of the reasons to impose discipline on judges is to "enforce adherence to the law itself—so that neutral principles rather than a judge's personal preferences motivate her decision in each individual case").

119. See *supra* Part IV.B.

120. Silverstein, *supra* note 20, at 76.

121. *Hodgson v. Minnesota*, 497 U.S. 417, 441 (1990).

stand, as the clock will simply run out for the minor's decision and she might be forced by the law, and her parents, to carry the pregnancy to term.

In addition, the Supreme Court's decision in *Casey* dramatically increases the negative consequences that may arise from forcing judges to hear bypass petitions. *Casey* provided states with the stamp of approval to express a desire for childbirth over abortion.<sup>122</sup> However, *Casey* "is not specific with respect to how far states may go in persuading women to pursue childbirth rather than abortion."<sup>123</sup> As a result, some state court judges have gone so far as to appoint the fetus a guardian ad litem to represent its interests during the hearing.<sup>124</sup> Legal scholars who have analyzed the constitutionality of such appointments have reached the conclusion that given the state's interest in promoting childbirth over abortion, the appointment of a guardian ad litem to a fetus is likely valid under the undue burden standard.<sup>125</sup> Thus, even though such appointments are rare, if judges must hear bypass petitions to avoid an undue burden on the minor's right to choose, the appointments may become more common.<sup>126</sup>

#### D. POSSIBILITY OF PROCEDURAL DUE PROCESS VIOLATIONS

In addition to concerns about creating an undue burden on the minor's right to choose, judicial recusals also raise the specter of potential violations of procedural due process. Supreme Court precedent makes it explicitly clear that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."<sup>127</sup> Although the right to a hearing is not absolute, and may be waived due to failure to appear or procedural error,<sup>128</sup> the Constitution requires that all litigants at least have the *opportunity* for a hearing in a "meaningful time and in a meaningful manner."<sup>129</sup>

If all, or a sufficiently large portion, of the judges in an area recuse themselves from bypass petitions on moral grounds, an additional argument could be made that pregnant minors' due process rights are being violated because the minors are denied the opportunity to have their petitions heard in a sufficiently timely manner. States with parental

---

122. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877-78 (1992).

123. Silverstein, *supra* note 20, at 93.

124. *Id.* at 69-70; see also *In re Anonymous*, 720 So. 2d 497, 499-500 (Ala. 1998) (discussing the constitutionality of guardians ad litem for fetuses).

125. Silverstein, *supra* note 20, at 111.

126. *Id.* at 89-90.

127. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

128. *Id.* at 378.

129. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

consent or notification laws have imposed strict regulations on minors, requiring them to involve either their parents or a judge in their abortion decision. If a minor does not feel as though she can approach her parents about the topic, her only other choice is to petition the court for a waiver of the law. Therefore, if all the judges in her area refuse to hear bypass petitions the minor's opportunity for a hearing in a "meaningful time and meaningful manner" is denied. Even if there are judges willing to hear bypass petitions located in other distant parts of the state, the minor may not be able to have her petition heard by those judges for practical reasons, such as lack of time and money.<sup>130</sup> Arguably, this, too, violates the minor's procedural due process rights. Thus, the possibility for violations of minors' procedural due process rights creates an alternative rationale for the argument presented in the preceding parts; however, such arguments are raised here solely for additional consideration and are beyond the scope of this Note.

#### CONCLUSION

As abortion restrictions continue to assert themselves as a political issue, the prospect of more and more judges recusing themselves from minors' bypass petitions becomes increasingly likely. While these recusals are essentially harmless when rare, as they increase in frequency they greatly enhance their threat to minors' constitutional rights. In situations where collective judicial recusals have effectively removed a majority of the judges willing to hear bypass petitions, a substantial obstacle is created in the path of the minor's right to choose and this is an undue burden, as defined by *Planned Parenthood v. Casey*, and consequently unconstitutional.

For parental consent or notification laws to remain constitutional, the judicial bypass procedure must work effectively. This means states must ensure there are a substantial proportion of judges willing to hear the petitions, or, if not, states must enlist the help of judges in neighboring parts of the state where judges are willing to hear bypass petitions. If these steps fail, states must force unwilling judges to hear the petitions under the Rule of Necessity. This escalation is necessary to ensure that restrictive parental consent laws and concentrated pockets of socially conservative judges do not combine to undermine minors' constitutionally-protected reproductive rights. Unfortunately, there is a risk that in areas of the country where this combination of elements is likely to be found, the political environment may not be conducive to executing steps to safeguard minors' constitutionally-protected reproductive rights. If a state with a parental consent or notification statute and widespread judicial recusals fails to remedy the situation, and

---

130. See Silverstein & Speitel, *supra* note 27, at 119.

the problem escalates into an implicit undue burden on minors' rights to choose, then the parental consent or notification laws would be unconstitutional, and hence, unenforceable.